

OGC HAS REVIEWED.

CITIZENSHIP

1. Child Born Abroad.
2. Expatriation.

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17 October 1949

Office of General Counsel

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Citizenship of Children of [REDACTED]

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1. This is in reply to the questions raised in your memoranda of 20 September 1947 and 9 September 1949. [REDACTED] is a U. S. citizen employed by this [REDACTED]. Since his wife is an alien, some question has arisen in regard to the citizenship of his children. [REDACTED] The problem was originally presented following the birth of Subject's daughter on 8 August 1947, and it has now arisen again after the recent birth of another child. The question has considerable attraction from a standpoint of technical interest, but it is even more appealing because of our sympathetic desire to alleviate what appears to be an inequitable situation. We have, therefore, again studied the ingenious and interesting argument presented, and studied the legislation involved.

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3. The pertinent provision of the law, which is the Nationality Act of 1940, is found in Title 8 USCA §.601 (g) and states:

"A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: Provided, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up residence in the United States or its outlying possessions by the time

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he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

"The preceding provisions shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the United States or a bona fide American educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation."

4. The desire to interpret the statute in a light which is favorable to the employee is certainly most compelling. He realized the possibility that the American citizenship of his children might not be assured unless he returned in person to the United States prior to their birth. The fact that he did not do so is the direct result of a request on the part of this Agency that he remain in Italy and continue the work which was, and still is, of considerable value to our operations. He has not discovered that his fears were justified, that his children are not citizens of the United States, but aliens who will be required to acquire their citizenship by naturalization when they become of age. We are completely sympathetic and can readily understand his desire to establish them U. S. citizenship by birth. As a matter of fact we believe it would be unnatural if he felt otherwise. But wherever our sympathies may lie, we cannot torture into the statute a meaning that does not exist. Your argument is ingenious and obviously the result of considerable research. However, we believe there are certain assumptions that cannot be supported.

5. By its express terms, the Act extends citizenship by birth to a child born outside the U. S. and its outlying possessions when one parent is an alien and the other is a U. S. citizen who, prior to the child's birth, had lived for ten years in the United States or its possessions and had lived there for at least five years of the ten after reaching the age of sixteen. If the child does not possess a parent in that category, then citizenship is not automatically granted to him at birth. It is true that prior to the Nationality Act of 1940 the citizen parent would have been required to live in the United States for no longer than one day to qualify the child for citizenship. An examination of the reports and hearings held on the Act prior to its passage shows that the legislators specifically considered this point and intentionally inserted the ten-year limitation as a qualification. As a point of fact, the ten-year figure was something of a compromise,

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since the representative of the State Department indicated that that Agency desired a much longer period. Thus, although the child born abroad of a citizen parent with ten years and one month of American residence, living abroad by his own preference, is qualified as a citizen at birth, it is unfortunately true that the child of a citizen parent with nine years and eleven months of American residence, living abroad in the service of the Government, is classified as an alien. It would be equally true - as it was under the old law - if only one day separated the two conditions of status. The effect of the "provisos" is to stop the operation of the grant of citizenship if the child does not perform certain acts within stated times. Black, in the Third Edition of his Law Dictionary, defines "proviso" as: "a condition or provision which is inserted in a deed, lease, mortgage, or contract, and on the performance or nonperformance of which the validity of the instrument frequently depends; it usually begins with the word 'provided.'" He goes on to explain that a proviso is commonly found at the end of an act or section, and is usually introduced by the word "provided." While that word, as such, is not necessary, and the letter and form of the succeeding words are controlling, nevertheless, where the provisos are clearly enumerated, and the intent of the authors is unequivocal, they must be accepted as they are written. The exemption contained in the second paragraph must be restricted to the provisos themselves and not to the basic grant which they modify. We agree that Congress could have drafted the section to read "A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States, the other being an alien; Provided etc." But the fact is that they did not so write it.

6. The amendment of July 31, 1946, provided for slightly more liberal limitations on the residence of a parent who served in the armed forces during the last war. It still required a total of 10 years' U.S. residence prior to the birth of the child, but it lowered the age limit from 10 to 12. The passage of this amendment, you assert, cannot be accepted as a confirmation of Congressional intent not to make an exception in cases of citizen parents residing abroad in the service of a bona fide American interest." You base your conclusion on two reasons: first, because the actual membership of Congress had changed between the passage of the Act and the amendment; and, second, because the amendment was made necessary by the interpretation of the original language, and not by the original language itself. We are sorry that we cannot agree. Granted the amendment was the product of a different body of men, the very fact that it retained the ten year qualification demonstrates their concurrence in the intent of the other Congress. We do not believe that the present interpretation of the Act is capricious or distorted, and it would appear that the amendment was passed only to avoid prejudice to those men serving the

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country overseas who had sacrificed four years of residence within the U. S. or its outlying possessions during the war. To that extent, it nullifies any implication of constructive residence outside the United States or its continental possessions when the citizen parent is serving in the U. S. Armed Forces or a Governmental agency.

7. In view of our conclusions as outlined above, we feel that the interpretation placed on the Act by the State Department is perfectly justified, and since Mr. [REDACTED] has only five years and one month total residence within the United States to his credit, neither child has obtained citizenship under the Act.

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